83-202

No. .....

In The
Supreme Court of the United States
October Term, 1983

CITY OF COLUMBIA, MISSOURI,
A Municipal Corporation,
Petitioner-Appellee,

vs.

PAUL N. HOWARD COMPANY,
A North Carolina Corporation,
Respondent-Appellant,

and

JOHN S. HILL, d/b/a BRUCE WILLIAMS LABORATORY, INC.,
Third-Party Defendant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Under the Erie Doctrine, is a federal court of appeals sitting in a diversity of citizenship case required to adopt the same construction of particular contract language as adopted by a state appellate court construing substantially the same language?

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OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 707 F. 2d 338 (8th Cir. 1983) and is reproduced as Appendix A, App. 1-7. The order of the Court of Appeals for the Eighth Circuit denying a petition for rehearing en banc is reproduced as Appendix B,

App. 8. The opinion of the District Court is unreported and is reproduced as Appendix C, App. 9.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on May 11, 1983. A petition for rehearing en banc was denied on June 9, 1983. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

STATEMENT OF CASE

In February and March, 1980, the CITY OF COLUMBIA, MISSOURI advertised for bids for the construction of an outfall sewer improvement. The successful bidder, the PAUL N. HOWARD COMPANY (Contractor) based its bid upon a document entitled "Specifications and Documents, Columbia, Missouri, Sewerage Improvements," which document became the contract document. The Appendix to that document contained test boring logs. The logs set forth the results of subsurface test bores conducted by a consultant on the City's behalf. The test boring logs purport to classify the results of certain tests conducted by the consultant utilizing a specified piece of equipment (an auger) at stated geographical points.

The Contractor claimed that it incurred an additional One Hundred Thirty-seven Thousand Dollars ($137,000.00) in expenses as a result of the differing conditions. The Contractor notified the City of its claim, filed a claim contending that it was entitled to payment for those expenses

under the "differing site conditions" provision in the contract. The first clause of that provision provides for reimbursement of costs resulting from "(s)ubsurface or latent physical conditions at the site differing materially from those *indicated in this contract. . . .*" (Emphasis added.) No claim was made under the second clause of the "differing site conditions" paragraph which provides for additional compensation if unusual and unknown conditions not ordinarily inhering in that type of work are encountered.

The City filed a Petition for Declaratory Judgment in state court based upon a then-recent state court appellate opinion, arguing that the test boring logs were not a part of the contract and therefore the Contractor was not entitled to additional compensation under the foregoing contract provision. The City relied upon an exclusion set forth on the cover page of the test boring logs which stated as follows: "These reports are for reference only and are not a part of the contract documents."

The Contractor, a North Carolina corporation, removed the action to federal court based on diversity. The District Court granted a motion for summary judgment filed by the City since the Contractor's claim was based upon the excluded test boring logs.

On May 11, 1983, the United States Court of Appeals for the Eighth Circuit reversed the summary judgment entered by the District Court and remanded the case for further proceedings in accordance with its opinion. On June 9, 1983, the court en banc denied Petitioner's petition for a rehearing.

For reasons set forth herein, Petitioner CITY OF COLUMBIA, MISSOURI believes that the Eighth Circuit

Court of Appeals inadvertently failed to apply controlling law with respect to the "differing site conditions" claim. (Petitioner does not seek review of the Court of Appeals' ruling with respect to the "tort" theory alleged by the Contractor.)

ARGUMENT

In a diversity action, state law controls as to the construction of contracts. *Erie R. Co. v. Tompkins*, 304 U. S. 648, 58 S. Ct. 817 (1938); *Pet Milk Co. v. Boland*, 185 F. 2d 298 (CA8 1950). Stated otherwise, under the Erie Doctrine, if a state court has construed particular contract language, that construction is binding upon a federal court sitting therein in a diversity action.

In the diversity case at bar, the disputed contract language provides for the payment of additional compensation to the contractor where the contractor encounters "conditions at the site differing materially from those *indicated in this contract*". (Emphasis added.) However, the cover sheet to the test boring logs upon which the Contractor bases its claim conspicuously stated that: "These reports are for reference only and are not a part of the contract documents." The Contractor admitted it was aware of the exclusion in interrogatory answers but didn't feel that that language would be given legal effect. Petitioner contends that the latter exclusion prohibits recovery of additional compensation based upon the encounter of subsurface conditions which allegedly differed from conditions set forth in the excluded test boring logs.

On appeal, the Contractor argued that other contract provisions created an ambiguity as to whether the test boring logs were excluded from the contract. However, in its May 11, 1983 opinion, the Eighth Circuit (App. 4-5) held that:

> The test boring logs do not have to be strictly considered "a part of the contract documents" (which the Appendix states they are not) to be binding on the City to the extent of their own accuracy. We can accept the City's argument that the Appendix is not an item listed *in* the Table of Contents (but is an addition to the Table of Contents) and therefore the Appendix is not a part of the contract.

The Court then held (App. 4-5) that:

> Even though the logs may not be included in the contract, they are "indicated" in the contract, in SC-20 "Test hole information represents subsurface characteristics to the extent indicated, and only for the point location of the test hole." SC-20 indicates the conditions by reference to the logs and specifically indicates the accuracy of the logs. This reference to the test hole information appears to be a sufficient indication of physical conditions to make the differing site conditions provision applicable. *Id.*

Thus, the Eighth Circuit adopted a definition of the word "indicated" which equates the term with "mentioned" or "referred to" (but not "incorporated by reference"). Such a construction of the contract language in dispute is in direct opposition to the construction of like language adopted by a state appellate court in a recent opinion. In *Air Cooling and Energy, Inc. v. Midwestern Construction Company,* 602 S. W. 2d 926 (K. C. Mo. App. 1980) the contract contained a very similar "differing site conditions" clause (l.c. 931) and the test boring logs were excluded from the contract as follows (l.c. 929):

a. Subsurface data has been obtained for design purposes.

b. The location of each exploration and information obtained are indicated in separate documents that will *not* be *made a part of this contract.* (Emphasis added.)

As can be seen, the *Air Cooling* contract "indicated" subsurface conditions in the sense that test boring logs were referred to or mentioned in the contract in the provisions just quoted. However, the state Court clearly held that the Contractor was not entitled to recovery for breach of contract (among other theories advanced therein). The Court stated at page 930 that:

> The data and documents regarding the borings and specifications were specifically excluded from the contract between the parties. The net result is that Appellant agreed to dig and clear the trench for a specific price.

At page 931, the Court held that there was no evidence of breach of contract, stating that:

> In essence, Appellant was entitled to a change order if conditions differed materially from those represented in other contractual documents. . . . The contract specifically excludes the boring logs.

It is therefore clear that the Eighth Circuit Court of Appeals' interpretation of the "differing site conditions" clause is at odds with the construction of such a clause adopted in 1980 by the Missouri Court of Appeals for the Western District. Under the Erie Doctrine, the latter governs.

The net effect of the decision below is that the Contractor and other claimants similarly situated will be en-

titled to a more favorable jury instruction in federal court than in state court. In fact, the opinion below would apparently require the federal district court to enter summary judgment in favor of the Contractor.

In the final analysis, the court below apparently held that there was no ambiguity in the contract (as alleged by the Contractor to avoid summary judgment but assign a different meaning to the disputed language, thus creating the forum shopping problem that the Erie Doctrine was intended to prevent.

CONCLUSION

For the foregoing reasons, Petitioner CITY OF COLUMBIA, MISSOURI respectfully requests the Court to issue a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 82-1907

THE CITY OF COLUMBIA, MISSOURI,
a municipal corporation,

Appellee,

vs.

PAUL N. HOWARD COMPANY,
A North Carolina corporation,

Appellant.

JOHN S. HILL, d/b/a BRUCE WILLIAMS
LABORATORIES, INC.

Appeal from the United States District Court
for the Western District of Missouri

Submitted: April 15, 1983

Filed: May 11, 1983

Before ARNOLD, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and HENLEY, Senior Circuit Judge

PER CURIAM.

Paul N. Howard Company (Howard) appeals the district court's granting of the City of Columbia's motion for summary judgment in this construction contract dispute. Because we feel this case is inappropriate for summary judgment, we reverse the judgment of the district court.

I.

In February and March, 1980 the City of Columbia advertised for bids for construction of a public sewer im-

provement. As a prospective bidder, Howard received a document entitled "Specifications and Documents, Columbia, Missouri, Sewerage Improvements." The Appendix to this document contained test boring logs. These logs contained the results of test bores of the subsurface conducted on the City's behalf. Howard claims that during construction it discovered that actual subsurface conditions differed substantially from that indicated by the test boring logs. It argues that it could prove that the test boring logs themselves were inaccurate as well as that they were not representative of actual subsurface conditions. Howard said it incurred an additional $137,000 in expenses as the result of the unanticipated conditions. Howard filed a claim with the City for this amount, saying it was entitled to payment for these expenses under the "differing site conditions" clause in the contract. The contract provides for reimbursement of costs resulting from "[s]ubsurface or latent physical conditions at the site differing materially from those indicated in this contract. . . ."

The City filed a petition for a declaratory judgment in state court, arguing that the test boring logs were not part of the contract and therefore Howard was not entitled to the additional compensation. The City relied on a disclaimer on the cover page of the test boring logs which read: "These reports are for reference only and are not a part of the contract documents." Howard removed the action to federal court based on diversity. Howard filed a counterclaim against the City, the City moved for summary judgment, and the district court granted the City's motion.

II.

The district court found for the City because the differing site conditions clause only applied to information indicated in the contract, and the disclaimer proved that the test boring logs were not a part of the contract. The court relied on *Air Cooling & Energy, Inc. v. Midwestern Construction Co.*, 602 S. W. 2d 926 (Mo. App. 1980), which held that a subcontractor could not recover extra compensation even though test boring logs were inaccurate because the contract had a disclaimer as to the accuracy of the data. We find that the court below erred in relying solely on the disclaimer to conclude that the test boring logs could not be relied upon by the contractor.

There are at least two parts of the contract which indicate that the test boring logs were a part of the contract and could be relied upon by the contractor. First, Article IV of the contract states that "the Contract Documents which comprise the contract between Owner and Contractor, attached hereto and made a part hereof, consist of the documents listed in the Table of Contents under the heading of "Appendix." Second, one of the supplementary conditions of the contract, SC-20, states: "Test hole information represents subsurface characteristics to the extent indicated, and only for the point location of the test hole. Each Bidder shall make his own interpretation of the character and condition of the materials which will be encountered between test hole locations." While this part of the contract supports the City's argument it is not responsible for unanticipated conditions *between* the test holes, it supports Howard's argument that it was entitled

to rely on the logs at least as to the actual conditions at the location of the test holes.

The district court made no attempt to reconcile these parts of the contract which could be seen as inconsistent with the disclaimer. As a general proposition, whenever possible, the law favors reconciliation of clauses within a contract which appear contradictory. *In re Marriage of Buchmiller*, 566 S.W. 2d 256, 259 (Mo. App. 1978); *see* Restatement (Second) Contracts § 202(5) (1981). When we examine the contract, we feel the various parts of the contract can be read consistently with each other by interpreting the contract to mean that the contractor could rely on the test boring logs only for their own accuracy and not for the conditions between the test hole locations.

The test boring logs do not have to be strictly considered "a part of the contract documents" (which the Appendix states they are not) to be binding on the City to the extent of their own accuracy. We can accept the City's argument that the Appendix is not an item listed *in* the Table of Contents (but is an addition to the Table of Contents) and therefore the Appendix is not a part of the contract. However, the differing site conditions clause need not be interpreted to limit reimbursements to situations where the logs themselves are necessarily a part of the contract. The clause entitles the contractor to reimbursement when there are "conditions at the site differing materially from those *indicated* in this contract." (Emphasis added.) Even though the logs may not be included in the contract, they are "indicated" in the contract, in SC-20 "Test hole information represents subsurface charasteristics to the extent indicated, and only for the point

location of the test hole." SC-20 indicates the conditions by reference to the logs and specifically indicates the accuracy of the logs. This reference to the test hole information appears to be a sufficient indication of physical conditions to make the differing site conditions provision applicable. SC-20, in very clear and uncontradicted language, only vouches for the accuracy of the test hole data and not for the conditions between the test holes.[1]

The *Air Cooling* case does not command a different result. In that case the contract specifically repudiated responsibility for the *accuracy* of the test hole results. The contract stated: "Neither the owner nor the engineer will be responsible for the completeness of [sic] accuracy of data so furnished." 602 S. W. 2d at 929. Here the disclaimer merely stated the logs were not a part of the contract.

Upon remand the district court will be free to take additional evidence on the interpretation of the contract, if it feels it needs to look beyond the four corners of the agreement to determine the meaning of the contract. *See Weldon, Wil'iams & Lick, Inc. v. L. B. Poultry Co.*, 537 S. W. 2d 868, 871 (Mo. App. 1976); *E. O. Dorsch Electric Co. v. Plaza Construction Co.*, 413 S. W. 2d 167, 172 (Mo. 1967).

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[1]Our analysis is not affected by the City's argument that it disclosed the data only to avoid liability for nondisclosure. *Maurice Mandel, Inc. v. United States*, 424 F. 2d 1252, 1255-56 (8th Cir. 1970). We rely on a reasonable interpretation of the contract, reconciling inconsistent provisions pursuant to Missouri law. Furthermore, in *Mandel* the test boring logs that were disclosed were accurate. *Id.* at 1256.

III.

Howard also argues on appeal that it has a cause of action against the City independent of the differing site conditions clause. Howard argues that even if it has no remedy under that clause, it has a cause of action based on its reliance on a misrepresentation by the City. Howard relies on *Clark v. City of Humansville*, 348 S. W. 2d 369 (Mo. App. 1961), which held "where plans or specifications lead a public contractor reasonably to believe that conditions indicated therein exist, and may be relied upon in making his bid, he will be entitled to compensation for extra work or expense made necessary by conditions being other than as so represented." *Id.* at 370, 374. This action sounds in tort rather than contract. *Id.* at 371, 374.

It is not clear whether the district court ruled on Howard's tort claim. The district court did not discuss the tort claim, but it did rely on the *Air Cooling* case, which discussed breach of warranty and *quantum meruit* theories of recovery, as well as breach of contract. 602 S. W. 2d at 928-30. It would not be surprising if the district court did not intend to rule on Howard's tort claim because Howard did not present this theory in the district court with the clarity it has presented the theory on appeal. In Howard's counterclaim, it simply stated that it was entitled to rely on the accuracy of the logs. Howard's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment did not specifically refer to a tort theory independent of the contract. Howard made general references to its right to rely on the logs, but it did not even cite the principal case it uses on this appeal for supporting the tort theory—*Clark v. City of Humansville*.

If the district court intended to rule on Howard's tort claim, we think summary judgment was inappropriate.

Howard should have the opportunity to prove the elements of the tort cause of action listed in *Humansville*. The *Air Cooling* case does not require a different result. The explicit disclaimer of the accuracy of the test hole information in that case made any reliance unreasonable. 602 S. W. 2d at 929-30.

If the district court did not rule on Howard's tort claim, that court should consider the claim in the first instance. If the court feels the issue had not been presented below, the court can permit Howard to amend its counterclaim pursuant to Fed. R. Civ. P. 15(a) to include the tort claim. Rule 15(a) states in pertinent part: "A party may amend his pleading . . . by leave of court . . .; and leave shall be freely given when justice so requires." The rule encourages courts to look favorably on requests to amend "when justice so requires." C. Wright and A. Miller, Federal Practice and Procedure § 1484, at 417 (1971). An amendment can be proper after remand to the district court even if the claim was presented for the first time on appeal or had not been presented to the district court in a timely fashion. *Holland v. Parker*, 469 F. 2d 1013, 1015-16 (8th Cir. 1972); *International Ladies' Garment Workers' Union v. Donnelly Garment Co.*, 121 F. 2d 561, 563 (8th Cir. 1941); C. Wright and A. Miller, Federal Practice and Procedure § 1489, at 450 (1971).

Accordingly, the judgment of the district court is reversed and the case remanded for proceedings consistent with this opinion.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term 1982

No. 82-1907-WM

THE CITY OF COLUMBIA, MISSOURI,
a municipal corporation,

Appellee,

vs.

PAUL N. HOWARD COMPANY,
A North Carolina corporation,

Appellant.

JOHN S. HILL, d/b/a BRUCE WILLIAMS
LABORATORIES, INC.

Appeal from the United States District Court
for the Western District of Missouri

The Court, having considered appellee's petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied.

June 9, 1983

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI CENTRAL DIVISION

No. 81-4250-CV-C-5

THE CITY OF COLUMBIA, MISSOURI,

Plaintiff,

vs.

PAUL N. HOWARD COMPANY,

Defendant,

and

JOHN S. HILL, d/b/a Bruce Williams Laboratories,

Third-Party Defendant.

ORDER

(Filed June 25, 1982)

Defendant was awarded a contract for the construction of a sewer improvement owned by the plaintiff. When the construction was substantially completed, defendant encountered subsurface conditions which it alleged were materially different from the conditions indicated in the contract documents. Defendant submitted a "differing site conditions" claim for reimbursements for costs resulting from the alleged differing conditions.

Plaintiff filed a declaratory judgment action seeking a determination that plaintiff is not liable for defendant's claim because the claim does not come within the "differing site conditions" clause of the contract. Defendant has filed a counterclaim seeking recovery against plaintiff on

its "differing site conditions" claim. Plaintiff has moved for summary judgment on its declaratory judgment action and on defendant's counterclaim. For the reasons stated, plaintiff's motion for summary judgment is sustained.

Defendant's claim is under the "differing site conditions" clause of the contract which provides for reimbursement of costs resulting from "subsurface or latent physical conditions at the site differing materially from those indicated in this contract. . . ." Defendant contends that it encountered subsurface conditions which materially differed from the conditions indicated in test boring logs furnished by plaintiff as an appendix to the Bidders Documents. Plaintiff argues that the test boring logs were specifically excluded from the contract. The cover sheet for the appendix which contained the test boring logs states that "*THESE REPORTS ARE FOR REFERENCE ONLY AND ARE NOT A PART OF THE CONTRACT DOCUMENTS.*" In addition, several provisions in the contract provide that the bidder is responsible for determining the character of surface and subsurface materials.

The question before this Court is whether the test boring logs constitute a part of the contract. If not, the "differing site conditions" clause does not apply, and summary judgment should be entered in favor of plaintiff.

In this diversity action, Missouri substantive law applies. The precise question at issue here was addressed by a Missouri appellate court in *Air Cooling and Energy, Inc. v. Midwestern Construction Company of Missouri*, 602 S. W. 2d 926 (K. C. Mo. App. 1980). In that case, a subcontractor encountered rock during water line trench

excavation and sought additional compensation for differing site conditions. The court held that the subcontractor could not recover extra compensation under a breach of contract theory because the boring data provided to the bidders was specifically excluded from the contract. The contract provisions in the *Air Cooling* case are substantially similar to the contract provisions involved in this case. The *Air Cooling* case is directly on point and provides the controlling law.

The contract clearly excludes the test boring logs from contract documents. Under Missouri law and the undisputed facts of this case, defendant has no claim for reimbursement for costs resulting from differing conditions. Accordingly, summary judgment should be entered in favor of plaintiff.

For the reasons stated, it is hereby

ORDERED that plaintiff's motion for summary judgment is sustained. The parties will bear their own costs.

/s/ Scott O. Wright
United States District Judge

June 25, 1982.